

1-1-1997

# Preserving a Place for the Past in Our Future: A Survey of Historic Preservation in West Virginia

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## Recommended Citation

Megan M. Carpenter, *Preserving a Place for the Past in Our Future: A Survey of Historic Preservation in West Virginia*, 100 W.Va. L. Rev. 423 (1997).

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# **PRESERVING A PLACE FOR THE PAST IN OUR FUTURE: A SURVEY OF HISTORIC PRESERVATION IN WEST VIRGINIA**

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## I. INTRODUCTION

A. *Morgantown, Summer 1997*

Downtown Morgantown received historic designation in 1996, when the Morgantown Historic Landmarks Commission succeeded in placing it on the National Register of Historic Places because of its historic character.<sup>1</sup> Many of the buildings downtown are reminiscent of the 1920s, a time when Morgantown's industry prospered and twenty-four passenger trains per day came into the city.<sup>2</sup> This decade saw more fundamental changes than had taken place in the entire century and a half of Morgantown's previous existence.<sup>3</sup>

Historic designation is an important step toward protecting a historic district, in part because it allows property owners to obtain tax credits in the rehabilitation of their properties. Not only does it certify the importance of an historic area, but it also creates economic opportunities for property and business owners in that area through both tax credits and tourism opportunities. Because historic designation and the tax credits that go along with it can be lost if more than sixty-five percent of all downtown structures in an historic district lose their historic character, designation depends upon the cooperation of property owners.<sup>4</sup> It imposes a responsibility on all property owners to work together to maintain the historic integrity of the district.<sup>5</sup> This responsibility becomes especially important in an area like downtown Morgantown, which has seen a great deal of development due to a seasonal economy dependent upon the University community.<sup>6</sup> Certain actions of property owners of contributing buildings within an historic district can impact other property owners and their ability to access the tax credits. Therefore, it is important that such owners consider the other buildings when making changes that no longer respect the historic integrity of their building.

In the Spring of 1997, WesBanco, headquartered in Wheeling, bought The

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<sup>1</sup> Interview with Barbara Rasmussen, President, Morgantown Historic Landmarks Commission (Nov. 9, 1997).

<sup>2</sup> WEST VIRGINIA UNIVERSITY PUBLIC HISTORY OPTION, MORGANTOWN BICENTENNIAL COMM'N, MORGANTOWN: A BICENTENNIAL HISTORY 7 (1985).

<sup>3</sup> *Id.*

<sup>4</sup> Rasmussen, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

National Bank of West Virginia.<sup>7</sup> The building, a 1920s structure of modest Depression-era commercial architecture, flanks the approach to downtown Morgantown's Sadie Crowe mini-park in the historic district.<sup>8</sup> The building had served many uses throughout its history in downtown Morgantown, including housing a Woolworth's and serving as a location for religious services for the local Jewish community.<sup>9</sup> The new owners determined that the building did not look enough like a bank.<sup>10</sup> The new property owners claimed that the building had a "readily apparent lack of architectural significance and aesthetics" and that nothing remained of the original building "worth keeping."<sup>11</sup> The company proposed to completely and permanently alter the historic facade by removing the glass entry, changing the windows, adding columnar decor, and creating a false parapet third level, which would make the bank appear taller.<sup>12</sup>

Several civic organizations expressed their dismay over the project. The State Historic Preservation Office within the West Virginia Division of Culture and History emphasized that "sensitive planning and design could achieve a facade that would be in keeping with the history and character of the area, but would also meet acceptable guidelines for rehabilitation."<sup>13</sup> Main Street Morgantown, an organization dedicated to the economic and aesthetic revitalization of downtown Morgantown, employed an architect who proposed an alternative rehabilitation that would "respect the character of the building and work within its stylistic vocabulary."<sup>14</sup> Responding to the bank's concern that the building looked more like

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<sup>7</sup> Press Release, issued by Barbara Rasmussen, President, Morgantown Landmarks Commission, Morgantown, West Virginia (on file with Terri Cutright, Executive Director, Main Street Morgantown).

<sup>8</sup> *Id.*

<sup>9</sup> Rasmussen, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> Letter from Barton Loar, President of the Monongalia County Division, WesBanco, to Bill MacDonald, Design Co-Chair, Main Street Morgantown (Mar. 19, 1997); Letter from Barton Loar, President of the Monongalia County Division, WesBanco, to Barbara Rasmussen, President, Morgantown Historic Landmarks Commission (Mar. 19, 1997).

<sup>12</sup> Press Release, *supra* note 7.

<sup>13</sup> Letter from William Farrar, State Historic Preservation Office, West Virginia Division of Culture and History, to Ned George, CEO, WesBanco (Jun. 11, 1997).

<sup>14</sup> Letter from Michael Gioulis, Historic Preservation Consultant, to Terri Cutright, Executive Director, Main Street Morgantown (Jun. 20, 1997).

a five-and-dime store than a bank, the Morgantown Historic Landmarks Commission emphasized successful examples of adaptive reuse by other downtown historic property owners.<sup>15</sup> One downtown bank restored a dry goods store, while another adapted a building that had housed both a post office and a men's clothing store.<sup>16</sup> The Preservation Alliance of West Virginia, Inc. (Preservation Alliance), West Virginia's largest private preservation organization, stressed that communities that protect their heritage can benefit economically: "Morgantown and the Monongahela River Valley have a history that spans more than two centuries. Three wars, an industrial revolution, and a nationally respected university are part of the community's heritage. We believe that absentee-owned businesses have an obligation to help us nurture that economic resource."<sup>17</sup> A decision to alter a structure that contributes to the historic district of Morgantown could threaten the historic designation for everyone, thereby affecting some 125 other property owners.<sup>18</sup>

There is no law that protects historic structures by virtue of their listing on the National Register of Historic Places. The only legal mechanism for such protection is through local design review, which most cities in West Virginia, including Morgantown, have not yet adopted.<sup>19</sup> Thus, despite objections from the preservation community, WesBanco completed its proposed construction on the building in November, permanently altering the historic facade on a contributing structure to the downtown historic district. The rehabilitation not only destroyed existing historic architectural elements, but also created a false building by raising its height to a three story elevation, where there is no third story.<sup>20</sup>

This incident, played out in downtown Morgantown throughout the summer of 1997, is one that occurs more and more frequently in towns across West Virginia. The push to develop our resources too often runs counter to the push to preserve them. However, this need not be the case. The following survey will discuss the development of historic preservation and its economic benefits, the mechanisms by which historic resources can be protected, and available programs and incentives for preservation.

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<sup>15</sup> Press Release, *supra* note 7.

<sup>16</sup> Rasmussen, *supra* note 1.

<sup>17</sup> Press Release, *supra* note 7.

<sup>18</sup> *Id.*

<sup>19</sup> Rasmussen, *supra* note 1.

<sup>20</sup> Letter from Michael Gioulis, *supra* note 14.

B. *Development of Historic Preservation*

In order to understand historic preservation law, it is important to understand the context in which concern for the protection of cultural resources has developed. The Mount Vernon Ladies' Association is usually credited with the first "move" in the historic preservation movement.<sup>21</sup> In 1853, Ann Pamela Cunningham set out to save Mount Vernon from the hands of developers and restore it to the way it looked when George Washington resided there.<sup>22</sup> In the decades to come, other groups began the push to memorialize the events and heroes of the American Revolution.<sup>23</sup> Local historical societies initiated the purchase of old homes, and around the turn of the century, a few architects published books of details from old Georgian and Federal style houses.<sup>24</sup>

In 1906, Congress passed the Antiquities Act,<sup>25</sup> the first legislative attempt at protecting historic treasures.<sup>26</sup> The Antiquities Act authorized the President "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic" interest.<sup>27</sup> It also provides penalties for any person who injures, destroys, excavates, or appropriates an historic ruin on public lands or land owned or controlled by the federal government.<sup>28</sup>

Individual efforts at preservation became more common as the automobile industry was growing. In the 1920s, Henry Ford and John D. Rockefeller, Jr. put some of their fortunes from the industry into restoration projects.<sup>29</sup> Henry Ford created an area in Dearborn, Michigan, setting aside old buildings and paying

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<sup>21</sup> John C. Waters, *Master of Historic Preservation Programs: Flooding the Market or Filling a Niche?*, HISTORIC PRESERVATION FORUM, NATIONAL TRUST FOR HISTORIC PRESERVATION, Spring 1997, at 6.

<sup>22</sup> Charles B. Hosmer, Jr., *Preservation – A Historical Perspective*, in CULTURAL RESOURCES MANAGEMENT 5, 5 (Ronald W. Johnson, et al. eds., 1987).

<sup>23</sup> *Id.* at 6.

<sup>24</sup> *Id.*

<sup>25</sup> 16 U.S.C. § 431 (1994).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Hosmer, *supra* note 22, at 7.

tribute to prominent figures in American history.<sup>30</sup> Rockefeller chose to return Williamsburg, Virginia to its colonial appearance.<sup>31</sup> He employed consultants, architects, engineers, landscape architects, and archeologists in this restoration project.<sup>32</sup>

Following the Great Depression, preservation efforts were mobilized in the Historic Sites Act of 1935.<sup>33</sup> This act declared it a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."<sup>34</sup> It focused the planning and administration program of historic preservation within the Department of the Interior.<sup>35</sup> Under this act, the Secretary of the Interior was authorized to restore, reconstruct, and maintain historic sites and properties.<sup>36</sup> It also authorized the secretary to enter into agreements with state and local governments to protect, preserve, maintain, or operate any historic property that was associated with a public use.<sup>37</sup> The Secretary of the Interior exercised this power for the first time the following year when he determined that land in St. Louis, Missouri possessed exceptional value as an historic site and instituted actions to acquire the land.<sup>38</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See 16 U.S.C. §§ 461–469 (1994).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *Barnidge v. United States*, 101 F.2d 295, 299 (8th Cir. 1939). The court described the particular historic significance of the land:

It appears that on the property included in this project were situated the Spanish Colonial office, where, during the administration of Thomas Jefferson, third President of the United States, all of the first territory comprised in the Upper Louisiana Purchase was transferred to the United States; the Government House at which, on March 9, 1804, Charles Dehault Delassus, the Spanish Commandant in St. Louis, transferred possession of upper Louisiana to Captain Amos Stoddard, of the United States Army, who had been delegated by France as its representative, and at which, on the morning of March 10, 1804, Captain Stoddard, as the agent of the United States, took formal possession of the Louisiana Purchase and raised the American flag, by reason of which transactions the Spanish, French, and

The Historic Sites Act also called for a National Survey of Historic Sites and Buildings.<sup>39</sup> At this time, however, the country was not ready for a national, comprehensive preservation program. Instead, the main focus of the nation was on rebuilding the economy in the Post-Depression era. Although an effective national preservation program was not yet in place, individual and local preservation efforts increased in force. In Charleston, South Carolina and New Orleans, Louisiana, communities attempted to preserve, for the first time, historic districts in their cities.<sup>40</sup> The Vieux Carre district in New Orleans began generating \$150 million annually in income from the tourist trade.<sup>41</sup> The Beacon Hill neighborhood in Boston enjoyed similar economic success as a result of its recognition and preservation as an historic district; between the years 1955 and 1962, property values in the neighborhood tripled.<sup>42</sup> Georgetown, a section of Washington, in the District of Columbia, was revitalized as a historic district and became one of the most fashionable and expensive areas in the city.<sup>43</sup>

Preservation efforts diminished in the light of World War II, and then increased following the end of the Korean War in the 1950s.<sup>44</sup> A Congressional charter created the National Trust for Historic Preservation in 1949.<sup>45</sup> In the years after the creation of the National Trust, "citizens became more aware of the need for further action to slow the loss of our national heritage."<sup>46</sup> Following a

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American flags waved successively over the site within a period of twenty-four hours; the place where Laclede and Chouteau established the first civil government west of the Mississippi; the place where Lafayette was received by a grateful people; the place where the Santa Fe, the Oregon, and other trails originated; the place where Lewis and Clark prepared for their trip of discovery and exploration, and the Court House in which the Dred Scott Case was tried.

*Id.*

<sup>39</sup> See 16 U.S.C. § 461 (1994).

<sup>40</sup> Hosmer, *supra* note 22, at 10.

<sup>41</sup> See Richard J. Roddewig, *Preparing a Historic Ordinance 2*, (PLANNING ADVISORY SERVICE) No. 374, 1983.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Hosmer, *supra* note 22, at 11.

<sup>45</sup> Waters, *supra* note 21, at 7.

<sup>46</sup> *Id.*



Congressional mandate, the National Park Service began the National Survey of Historic Sites and Buildings, which contained listings of registered National Historic Landmarks.<sup>47</sup> A group of mayors, along with members of the National Trust, formed a committee to investigate the need for a comprehensive preservation program in 1965.<sup>48</sup> The following year, the committee published its recommendations in a volume entitled *With Heritage So Rich*,<sup>49</sup> the recommendations for a comprehensive legislative program were codified later that year in what became known as the National Historic Preservation Act of 1966.<sup>50</sup>

During the 1970s, preservation efforts escalated on both national and local levels.<sup>51</sup> The National Trust for Historic Preservation increased its membership nearly tenfold in the decade after the 1966 Preservation Act was signed.<sup>52</sup> In addition, legislation supporting historic preservation was passed in greater numbers. The Archeological and Historic Preservation Act of 1974 increased the participation of the archeological community in preservation issues.<sup>53</sup> In 1976, Congress provided tax incentives for private sector participation in rehabilitation efforts.<sup>54</sup> At the same time, preservation services within the Department of the Interior were united under the auspices of the Heritage Conservation and Recreation Service.<sup>55</sup>

State planning and growth management laws have increased dramatically since the 1970s, and historic preservation legislation has been one of the newest and widely discussed areas of debate. A study by the National Trust for Historic Preservation in 1975 found 421 communities with local programs to protect historic

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<sup>47</sup> Hosmer, *supra* note 22, at 11.

<sup>48</sup> *Id.* at 12.

<sup>49</sup> *Id.*

<sup>50</sup> 16 U.S.C. § 470 (1994); See Brit Allan Storey, *The Advisory Council on Historic Preservation: Its Role in the Developing American Preservation Program*, in CULTURAL RESOURCES MANAGEMENT 21, 22 (Ronald W. Johnson et al. eds., 1987).

<sup>51</sup> Waters, *supra* note 21, at 7.

<sup>52</sup> Hosmer, *supra* note 22, at 14.

<sup>53</sup> See 16 U.S.C. §§ 469-469c (1994).

<sup>54</sup> Hosmer, *supra* note 21, at 15.

<sup>55</sup> *Id.* at 17.

resources.<sup>56</sup> By 1983, that number had more than doubled; approximately 1000 communities had historic preservation programs in place.<sup>57</sup> Ten years later, the National Park Service estimated that nearly 2000 communities were actively promoting preservation objectives.<sup>58</sup>

West Virginia has been, and continues to be, a part of this trend. Before the 1960s, virtually no historic preservation legislation existed in West Virginia. Since the National Historic Preservation Act passed in 1966, West Virginia has enacted historic preservation laws on state, county, and municipal levels, affecting historic properties across the state. West Virginia's legislation assigns administration of national historic preservation regulations, creates a state historic preservation commission, and enables counties and municipalities to control their own historic properties.<sup>59</sup>

The multiplicity of legislative layers does not ensure the protection of historic properties, however. Properties having historic significance can be listed on the National Register of Historic Places, but a listing does not guarantee protection. It only makes property owners eligible for tax credits for rehabilitation and offers a limited form of protection if federal funds are involved in a project affecting such a property. If federal funds are to be used in a project that affects a property eligible for a listing on the Register, then the advisory council of the National Trust for Historic Preservation must review the project and assess any damages to the historic property. Called the Section 106 review process, it requires the advisory council to try to mitigate damages to an historic property wherever possible. If the proposed project is privately funded, however, there is no system for protection. The only mechanism for the protection of privately-owned historic properties exists on the local level through historic landmarks commissions and design review. City or county governments can endow a local landmarks commission with the power of design review. Design review is a system of regulations that can be set up to protect historic properties, even if they are privately owned.

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<sup>56</sup> Bradford J. White & Richard J. Roddewig, *Preparing a Historic Preservation Plan I*, (PLANNING ADVISORY SERVICE) No. 450, 1994.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See W. VA. CODE § 29-1-1 (1997 Supp.); W.VA. CODE § 8-26A-4, -5 (1998).

C. *Economic Benefits of Historic Preservation*

The economic benefits of historic preservation are becoming more and more apparent as efforts to preserve our heritage increase. Preservation Alliance and Main Street West Virginia recently joined together to estimate the impact of historic preservation on the state's economy.<sup>60</sup> Preservation Alliance hired the West Virginia University Bureau of Business and Economic Research to conduct a study quantifying "the direct and indirect economic impacts associated with historic preservation capital expenditures and heritage tourism."<sup>61</sup> The study estimated the impact of non-residential historic preservation construction on the economy by examining several programs, including the following: preservation grants through the West Virginia Division of Culture and History, Main Street organizations, and heritage tourism.<sup>62</sup>

Grant programs through the Division of Culture and History, including the Historic Preservation Tax Credit Program, the Preservation Grant Program, and the ISTEA Transportation Enhancement Program resulted in six million dollars worth of construction projects and eight million dollars in total business volume.<sup>63</sup> These grants also created 112 job opportunities statewide.<sup>64</sup>

Main Street West Virginia (Main Street) also had a substantial effect on the economy of the state through the revitalization of central business districts.<sup>65</sup> Businesses in Main Street communities receive technical planning, design, organizational, and training assistance.<sup>66</sup> The Bureau of Business and Economic Research included facades, rehabilitation, new construction, and public improvements from nine of the seventeen local Main Street organizations in its

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<sup>60</sup> PRESERVATION ALLIANCE OF WEST VIRGINIA, INC., A SUMMARY OF THE ECONOMIC IMPACTS OF HISTORIC PRESERVATION IN WEST VIRGINIA 1 (1997) [hereinafter PRESERVATION ALLIANCE].

<sup>61</sup> *Id.*

<sup>62</sup> BUREAU OF BUSINESS & ECONOMIC RESEARCH, COLLEGE OF BUSINESS & ECONOMICS, WEST VIRGINIA UNIVERSITY, ECONOMIC IMPACT OF HISTORIC PRESERVATION IN WEST VIRGINIA 1 (Sept. 1997) [hereinafter BUREAU OF BUSINESS & ECONOMICS].

<sup>63</sup> *Id.* at 7-9.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 6.

<sup>66</sup> *Id.* at 4.

estimation of the economic impact of Main Street programs.<sup>67</sup> These nine organizations helped create 192 jobs in 1996.<sup>68</sup> They also generated ten million dollars worth of construction projects, resulting in an additional eight million dollars in business volume.<sup>69</sup> In total, these projects contributed an additional \$300,000 in state taxes.<sup>70</sup>

The study examined the economic impact of heritage tourism on the state. Heritage tourism is "recreational travel to sites or districts of historical significance."<sup>71</sup> Heritage tourism affects historic preservation in the attempt to restore or repair historical sites.<sup>72</sup> Heritage destinations in West Virginia include the following: historic railroads such as Cass; Civil War sites such as Harpers Ferry; state parks featuring historic sites such as Grave Creek mound, Blennerhassett Island, and Prickett's Fort; restored homes such as the Victorian Wheeling tours; and historic districts of several towns including Martinsburg, Morgantown, Hinton, and Lewisburg.<sup>73</sup> Prickett's Fort is an historic site that serves as an example of the potential economic impact of heritage tourism in West Virginia. In 1996, 14,000 visitors came to the fort.<sup>74</sup> These visitors generated eleven new jobs and almost one million dollars in total business volume.<sup>75</sup> Statewide, heritage tourism created nearly 390 jobs directly and another 130 jobs indirectly.<sup>76</sup> These employees earned \$8.2 million, and produced \$24.6 million in output.<sup>77</sup> Heritage tourism created an additional \$46.7 million in business volume,

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<sup>67</sup> BUREAU OF BUSINESS & ECONOMIC RESEARCH, *supra* note 62, at 4.

<sup>68</sup> *Id.* at 6.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 10.

<sup>74</sup> *Id.* at 13.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 10.

including \$15.4 million in business sales to tourists.<sup>78</sup>

The study identified other economic benefits of historic preservation as well. The revitalization of historic downtowns can help bring economic activity back into central business districts.<sup>79</sup> Main Street organizations can help cities adjust “to the new retail and service environment while preserving the historic nature” of their central business districts.<sup>80</sup> Furthermore, historic preservation has the potential to enhance overall property values. Across the country, property values have increased at a higher rate inside historic districts than outside, both in residential and commercial properties.<sup>81</sup> Examples of this increase are found in Richmond, Virginia and Georgetown, District of Columbia.<sup>82</sup>

Overall, historic preservation contributed sixty-eight million dollars to West Virginia’s economy in 1996.<sup>83</sup> It created 824 jobs, and contributed over one million dollars in assorted state taxes and revenues.<sup>84</sup> Preservation efforts can continue to have beneficial economic impacts as new businesses are created and existing businesses expand. Preservation does not simply provide people with a sense of identity and place from the past; it has the potential to substantially contribute to West Virginia’s economy in the future.

### III. MECHANISMS FOR PRESERVATION

#### A. *The Constitutional Basis for Historic Preservation*

The constitutional basis for historic preservation was established in 1978.<sup>85</sup> In that year, the United States Supreme Court recognized that the protection of landmarks and historic districts was a valid public purpose and a legitimate government function when it decided *Penn Central Transportation Co. v. New York*

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 14.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> PRESERVATION ALLIANCE, *supra* note 60, at 1.

<sup>84</sup> *Id.*

<sup>85</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

City.<sup>86</sup> Penn Central Transportation Company and its affiliates, who owned Grand Central Terminal, wanted to construct a multistory office building above the terminal.<sup>87</sup> Under New York City's Landmarks Preservation Law (Landmarks Law),<sup>88</sup> the terminal had been designated a "landmark" and the block it occupies a "landmark site."<sup>89</sup> Under the Landmarks Law, all owners of designated landmarks must secure approval from the city's Landmarks Preservation Commission before making any exterior alterations to the property.<sup>90</sup> The commission rejected Penn Central's plans for construction because it determined they were destructive of the terminal's historic and aesthetic features.<sup>91</sup> Penn Central brought suit, claiming that the city had "taken" its property without just compensation in violation of the Fifth and Fourteenth Amendments.<sup>92</sup> The transportation company also claimed that it was arbitrarily deprived of its property without due process of law in violation of the Fourteenth Amendment.<sup>93</sup>

The court addressed the issue of whether the restrictions imposed by New York City's Landmarks Law upon Penn Central's exploitation of the terminal site effect a "taking" of property for a public use within the meaning of the Fifth and Fourteenth Amendments.<sup>94</sup> In deciding whether or not a governmental action constitutes a "taking," the Court focused "on the character of the action and on the

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* Under the Landmarks Law, a building owner who wants to alter a landmark site may apply to the Commission for a "certificate of no effect on architectural features," a "certificate of appropriateness," or a "certificate of appropriateness" on the ground of insufficient return. *Id.* at 112. The Commission issues a general certificate of appropriateness if it concludes that the proposed construction does not hinder the protection, enhancement, perpetuation and use of the landmark's aesthetic, historical, and architectural values. *Id.* The Commission will issue a certificate of appropriateness based on insufficient return if the owner is incapable of earning a "reasonable return" on the site in its present state. *Id.* The latter procedure provides special mechanisms to ensure that designation as a landmark site does not cause significant economic hardship. *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 122.

nature and extent of the interference with rights in the parcel as a whole.”<sup>95</sup> The Court rejected Penn Central’s argument that any restriction imposed on individual landmarks pursuant to the New York City’s Landmarks Law is a “taking” because it singles out selected owners.<sup>96</sup> While recognizing that historic-district and zoning regulations apply generally to all properties while the Landmarks Law applies only to individual ones, it determined that landmark laws of this type are not discriminatory; rather, they embody “a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.”<sup>97</sup>

The Court noted that a government may enact laws or programs that adversely affect recognized economic values without constituting a “taking.”<sup>98</sup> Such laws are permissible where they serve a substantial public purpose and where a government has “reasonably concluded that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land.”<sup>99</sup> The Court found that New York City’s objective of preserving structures and areas with special historic, architectural, or cultural significance is a permissible governmental goal, and that the Landmarks Law is an appropriate means of attaining that goal. While the law places special restrictions of landmark properties to attain preservation objectives, it also attempts to ensure the owners of such properties a “reasonable return” on their investments.<sup>100</sup>

The well-developed nature of the New York City Landmarks Law and the presence of viable alternatives available to Penn Central were also influential in the Court’s reasoning. In discussing the nature of the New York City ordinance, the Court noted that it provides an opportunity for judicial review at both levels, landmark designations and permit approval.<sup>101</sup> This systematic opportunity for review helps ensure fair application of the ordinance itself. In the case at hand, the Court was influenced by Penn Central’s inaction; the transportation company did not seek judicial review of the terminal’s designation as a landmark site, nor did it seek judicial review when it was denied a certificate of no effect and certificates of

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<sup>95</sup> *Id.* at 130-31.

<sup>96</sup> *See id.* at 132.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 105.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 110.

<sup>101</sup> *Id.* at 111.

appropriateness. Furthermore, following denial of its certificate, Penn Central did not develop or submit other plans for the commission's consideration. The Court was also influenced by the comprehensive way in which the state Landmarks Preservation Commission systematically surveyed the city to identify potential historic properties. It noted that at that time, over 400 landmarks and thirty-one historic districts had been designated pursuant to the comprehensive Landmarks Law.<sup>102</sup>

The Court concluded that there were several viable alternatives available to the transportation company. It reasoned that because the terminal was tax-exempt, it remained suitable for its present and future uses.<sup>103</sup> First of all, Penn Central could continue to use the station as it had for years: as a railroad operations base and a retail location. Secondly, it could still earn a reasonable return on its investment; even if the terminal itself could never operate at a reasonable profit, some of the income from Penn Central's vast real estate holdings in the area must be imputed to the terminal.<sup>104</sup> Moreover, transferable development rights provided significant compensation for the loss of rights above the terminal itself.<sup>105</sup> Under New York City zoning resolutions, owners of landmark sites can transfer development rights to other parcels.<sup>106</sup> The ordinance permitted transfers from a landmark parcel to property across the street or opposite to another lot or lots.<sup>107</sup> The Court found that the development rights afforded Penn Central by virtue of the terminal's designation as a landmark were valuable because they afford Penn Central opportunities to enhance and develop other properties.<sup>108</sup>

By concluding that the application of New York City's Landmarks Law to the Grand Central Terminal was constitutional, *Penn Central* provides the constitutional foundation for much of historic preservation law. The court's ruling established the constitutionality of historic preservation, even as applied to individual, privately-owned properties. It also reaffirmed the value of having a well-developed preservation ordinance.

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 121.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 122.

<sup>106</sup> *See id.* at 114.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 129.



B. *The National Historic Preservation Act of 1966*

The National Historic Preservation Act<sup>109</sup> is the nation's central historic preservation authority. It sets up the basic framework of the modern historic preservation movement. The act established the National Register of Historic Places, which is composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture.<sup>110</sup> It also provides for an operational framework, incorporating State Historic Preservation Programs and state officers which assist the National Trust for Historic Preservation in maintaining the register.<sup>111</sup> The act is discussed throughout the various sections of this survey.

1. The Advisory Council on Historic Preservation – Federal Cultural Resources Management

The National Historic Preservation Act of 1966 created the Advisory Council on Historic Preservation.<sup>112</sup> The council is an independent federal agency within the executive branch of government that has evolved into a strong player in the historic preservation arena.<sup>113</sup> The involvement of the advisory council in historic preservation has increased in proportion to the number of properties listed on the National Register of Historic Places. From the late 1960s to the early 1970s, the register grew slowly. The advisory council's role during that time period was relatively minor. Between 1966 and early 1973, only 400 cases had been reviewed by the council.<sup>114</sup> This slow expansion can be attributed to the novelty of the national register, the lack of understanding typical in new federal programs, and the vagueness of the statutory language in Section 106 of the act. Currently, the council is essentially responsible for all federal cultural resources management.<sup>115</sup> The

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<sup>109</sup> 16 U.S.C. § 470a (1994).

<sup>110</sup> 16 U.S.C. § 470a(1)(A) (1994).

<sup>111</sup> 16 U.S.C. § 470a(b) (1994).

<sup>112</sup> See 16 U.S.C. § 470j (1994).

<sup>113</sup> Kristine M. Williams, *Preserving Historic Resources*, LAND USE LAW, Jun.1990, at 3; Storey, *supra* note 48, at 21.

<sup>114</sup> Storey, *supra* note 50, at 23.

<sup>115</sup> *Id.* at 41.

advisory council is the sole mechanism for evaluation of the impact on historic properties of undertakings by federal agencies.

The process of preservation draws from the expertise of individuals in many different fields, including the following: architects; archeologists; anthropologists; public administration officials; lawyers; historians; and urban planning experts, among others. The advisory council has expanded over time, in responsibility and in membership, to reflect this diversity. When it was created, the council was a relatively basic, two-dimensional body. Initially, the balance of power in the council was tipped in favor of federal agency control. It was comprised of seventeen members, including cabinet-level federal officials and the chairman of the board of trustees of the National Trust for Historic Preservation.<sup>116</sup> Ten other members were appointed by the President.<sup>117</sup> The current composition of the council recognizes the evolving nature of historic preservation as an interdisciplinary field. Not only has the membership of the advisory council expanded to represent the interdisciplinary nature of preservation issues, but the balance of power has shifted away from federal agencies, making the council a more independent, autonomous body.<sup>118</sup>

The jurisdiction and responsibilities of the council are also more expansive than they were at the time of its creation. Initially, the advisory council solely evaluated the federal historic preservation program.<sup>119</sup> The 1966 National Historic Preservation Act increased the council's responsibilities by distributing preservation responsibilities between the Secretary of the Interior and the advisory council.<sup>120</sup> The act placed responsibility on the Secretary of the Interior for developing and expanding the National Register of Historic Places, providing technical assistance, and distributing historic preservation grants.<sup>121</sup> The advisory council's role is more

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<sup>116</sup> *Id.* at 23.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 32. The advisory council is now comprised of nineteen members, including the following: A Chairman, appointed by the President and selected from the general public; the Secretary of the Interior; the Architect of the Capitol; the Secretary of Agriculture, and the heads of four other national agencies whose activities affect historic preservation; a governor; a mayor; the President of the National Conference of State Historic Preservation Officers; the Chairman of the National Trust for Historic Preservation; four historic preservation experts; and three members of the general public. 16 U.S.C. § 470i(a) (1994).

<sup>119</sup> Storey, *supra* note 50, at 21.

<sup>120</sup> See generally 16 U.S.C. § 470 (1994).

<sup>121</sup> See generally 16 U.S.C. § 470a(a)(1)(A) (1994).

general and more ambiguous: promoting historic preservation within and outside government, reviewing federal policies and programs that affect historic preservation, and commenting upon those policies and programs.<sup>122</sup>

The central responsibility of the advisory council is delineated in Section 106 of the National Historic Preservation Act (NHPA).<sup>123</sup> This section is significant because it assigns the responsibility for environmental review to the council:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.<sup>124</sup>

Over time, Congress has expanded Section 106, thereby broadening the advisory council's review powers. When the act was created in 1966, Section 106 only required federal agencies to review properties already on the National Register of Historic Places; it did not regulate review of properties eligible for, but not yet included on, the register.<sup>125</sup> Under the NHPA, federal agencies only had to identify and plan for affected historic properties that were actually listed on the National Register of Historic Places.<sup>126</sup> As originally written, Section 106 did not contain the language "or eligible for inclusion in."<sup>127</sup>

In 1976, Congress amended the act to include both properties that were on the National Register and properties that were eligible for inclusion in the

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<sup>122</sup> 16 U.S.C. § 470j(a) (1994).

<sup>123</sup> 16 U.S.C. § 470f (1994).

<sup>124</sup> *Id.*

<sup>125</sup> Law as of Oct 15, 1966, P.L. 89-665, 80 Stat. 917.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

register.<sup>128</sup> Congress passed this amendment partly as a response to and an affirmation of Executive Order 11593, *Protection and Enhancement of the Cultural Environment*.<sup>129</sup> The Executive Order, signed by President Nixon on May 13, 1971, came at a time when controversy about the scope of Section 106 peaked.<sup>130</sup> Because of the vague language contained in Section 106, various interpretations of the provision had arisen; in one councilman's opinion, agencies "sometimes attempted truly Byzantine and tortuous translations of it."<sup>131</sup> The order expanded the council's control by requiring federal agencies to obtain the advisory council's comments on any undertaking that affected eligible cultural resources.<sup>132</sup>

The council's role in the Section 106 review process was strengthened by the 1976 amendments and Nixon's executive order because the two laws both expanded the council's review powers and affirmed its responsibilities. By requiring all federal agencies to seek advisory council commentary, this administrative law dramatically expanded the responsibilities of both agency officials and the advisory council. Congress responded to the executive order by amending Section 106 to include not only listed properties, but also eligible properties. Because of this expansion, Executive Order 11593 and Section 106 of the NHPA broadened the jurisdiction of the advisory council and placed a greater burden on federal agencies to protect cultural resources.

The 1976 amendments helped clarify the jurisdiction and duties of both the advisory council and agency officials. The amendments had two prongs. First of all, as previously noted, the amendments added the phrase "or eligible for inclusion in" to Section 106.<sup>133</sup> In addition, however, Congress added an entirely new provision to the act. Section 211 permitted the council to establish procedures and regulations for Section 106 review.<sup>134</sup> This amendment effectively responded to the problem of enforceability that had plagued the council since 1966. Before this amendment, the act failed to guide the advisory council and federal agencies as to

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<sup>128</sup> Law as of Sept. 28, 1976, P.L. 94-422, 90 Stat. 1320.

<sup>129</sup> Executive Order 11593 (1971).

<sup>130</sup> Storey, *supra* note 50, at 25.

<sup>131</sup> *Id.* at 23.

<sup>132</sup> Executive Order 11593 (1971).

<sup>133</sup> 16 U.S.C. § 470f (1994).

<sup>134</sup> *Id.*

how to carry out Section 106 responsibilities.<sup>135</sup> Following the 1976 amendment, the council could establish “such rules and regulations as it deem[ed] necessary to govern the implementation of Section 106 of the Act.”<sup>136</sup>

The council exercised its authority in 1979 by promulgating a set of regulations guiding agency officials, state historic preservation officers, and the council in the conduct of the Section 106 process.<sup>137</sup> Called the *Protection of Historic and Cultural Properties*, they clarified each party’s respective responsibilities. The purpose of the regulations is to resolve conflicts through consultation.<sup>138</sup> Agency officials must identify affected historic properties, evaluate an undertaking’s effect upon those properties, and afford the council its opportunity to comment.<sup>139</sup> The state historic preservation officer is to coordinate state participation in the implementation of the act, as well as consult with and assist agency officials in identifying historic properties and evaluating the effects upon them.<sup>140</sup> The advisory council is responsible for comments to the agency official on any undertaking that affects historic properties.<sup>141</sup>

The regulations are explicit and detailed. First, the agency must identify historic properties by assessing information needs, locating historic properties, and evaluating the properties’ historical significance.<sup>142</sup> The agency official must “review existing information on historic properties potentially affected by the undertaking.”<sup>143</sup> This review includes any data concerning unidentified historic properties in the area.<sup>144</sup> The official must also seek advice from the state historic preservation officer on further necessary actions to better identify historic

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<sup>135</sup> Law as of Sept. 28, 1976, P.L. 94-422, 90 Stat. 1322.

<sup>136</sup> 16 U.S.C. § 470s (1994).

<sup>137</sup> 36 C.F.R. § 800.3 (1997).

<sup>138</sup> 36 C.F.R. § 800.1(b) (1997).

<sup>139</sup> 36 C.F.R. § 800.1(c)(1)(i) (1997).

<sup>140</sup> 36 C.F.R. § 800.1(c)(1)(ii) (1997).

<sup>141</sup> 36 C.F.R. § 800.1(c)(1)(iii) (1997).

<sup>142</sup> 36 C.F.R. § 800.4 (1997).

<sup>143</sup> 36 C.F.R. § 800.4 (a)(1)(i) (1997)

<sup>144</sup> 36 C.F.R. § 800.4(a)(i) (1997).

properties.<sup>145</sup> The agency must ascertain independent information from public and private organizations and from others who might know or be concerned about historic properties in the area.<sup>146</sup> Efforts to locate historic properties that may be affected by the agency's undertaking, as well as efforts to gather information about eligibility, follow the Secretary of the Interior's standards and guidelines.<sup>147</sup>

In evaluating the historical significance of identified sites, the agency official consults with the State Historic Preservation Officer (SHPO).<sup>148</sup> The official must apply National Register criteria to the properties to determine whether the proposed undertaking affects a particular property.<sup>149</sup> Properties previously determined to be eligible or ineligible must nonetheless be reevaluated if "the passage of time or changing perceptions of significance" justify doing so.<sup>150</sup> According to the National Register criteria, an undertaking has an effect on a historic property when it alters "characteristics of the property that may qualify the property for inclusion" in the register.<sup>151</sup> An undertaking has an adverse effect "when the effect . . . may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association."<sup>152</sup> Therefore, an undertaking may adversely affect an historic property even if the property is not physically altered. However, no adverse effect presumably exists where the undertaking is due to specific types of rehabilitation or where the historic aspects of the property are preserved.<sup>153</sup>

Specific provisions govern the relationship between the agency official and the SHPO. These regulations contain provisions in the event that the two entities agree or disagree on the identification of properties and/or assessment of effects.<sup>154</sup>

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<sup>145</sup> 36 C.F.R. § 800.4(a)(ii) (1997).

<sup>146</sup> 36 C.F.R. § 800.4(a)(iii) (1997).

<sup>147</sup> 36 C.F.R. § 800.4(b) (1997).

<sup>148</sup> 36 C.F.R. § 800.4(c)(1) (1997).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> 36 C.F.R. § 800.9(a) (1997).

<sup>152</sup> 36 C.F.R. § 800.9(b) (1997).

<sup>153</sup> *See generally* 36 C.F.R. § 800.9(c) (1997).

<sup>154</sup> *See* 36 C.F.R. § 800.4(c) (1997); 36 C.F.R. 800.5 (1997).

If the agency official and the SHPO determine that there is no adverse effect on the historic property, they submit summary documentation to the advisory council for comment.<sup>155</sup> If the agency official and the SHPO do find an adverse effect on the historic property, they will consult to determine methods of minimizing that effect.<sup>156</sup> They will then execute a memorandum of agreement, describing how the adverse effects will be taken into account in the proposed undertaking.<sup>157</sup> This memorandum is then submitted to the advisory council for comment.<sup>158</sup> In the event that the agency official and the SHPO cannot agree about the undertaking's effects, the agency official provides extensive documentation to the council and requests a commentary.<sup>159</sup>

After the advisory council has commented on the undertaking, the agency official must "consider the Council's comments in reaching a final decision on the proposed undertaking."<sup>160</sup> However, this provision breeds potential problems concerning the role of the advisory council in the protection of historic properties. While the interests represented by agency officials and SHPOs are clearly delineated, the advisory council finds itself in a less fortunate situation. While the council is responsible for protecting properties of historical, architectural, archeological, and cultural significance at the national, state, and local level, the council does not have any authority to enforce the protection. Federal agencies must seek the council's comments on any undertaking affecting historically significant property under Section 106.<sup>161</sup> However, the comments do not obligate the federal agency to follow the council's advice.<sup>162</sup>

In 1980, Congress amended the National Historic Preservation Act again, giving the advisory council slightly more power.<sup>163</sup> The amendment added Section 202(a)(6), which permits the council to "review the policies and programs of

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<sup>155</sup> 36 C.F.R. § 800.5(d)(1)(i) (1997).

<sup>156</sup> 36 C.F.R. § 800.5(e) (1997).

<sup>157</sup> 36 C.F.R. § 800.5(e)(4) (1997).

<sup>158</sup> *Id.*; 36 C.F.R. § 800.6(a) (1997).

<sup>159</sup> 36 C.F.R. § 800.6(b) (1997).

<sup>160</sup> 36 C.F.R. § 800.6(c)(2) (1997).

<sup>161</sup> 16 U.S.C. § 470f (1994).

<sup>162</sup> *See generally* 36 C.F.R. § 800.6(c)(2) (1997).

<sup>163</sup> *See* 16 U.S.C. § 470j (1994).

Federal agencies and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under" the act.<sup>164</sup> This amendment broadened the responsibilities of the council, and increased its involvement in federal agency policy-making.<sup>165</sup> However, the agencies are still not required to follow any of the council's recommendations.<sup>166</sup> Therefore, the advisory council has no enforcement power to protect historically significant properties, even though it must protect these properties pursuant to the National Historic Preservation Act.

a. Corridor H

The West Virginia State Historic Preservation Office is now working with the advisory council and the West Virginia Department of Highways concerning Corridor H.<sup>167</sup> At the time this Note was published, the proposed highway was in the middle of the Section 106 review process.<sup>168</sup>

The three parties determined that they would review Corridor H by dividing it into sixteen separate sections.<sup>169</sup> The advisory council has referred several of the sections to a keeper, an individual appointed by the council who dedicates most of her time to a particular project.<sup>170</sup> The council appoints a keeper in particularly controversial or politically sensitive projects.<sup>171</sup> Currently, the State Historic Preservation Office is in the process of reviewing survey reports done by the department of highways.<sup>172</sup> These survey reports purport to evaluate all properties affected by Corridor H which are either listed on or eligible for listing on the

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<sup>164</sup> 16 U.S.C. § 470j(a)(6) (1994).

<sup>165</sup> 16 U.S.C. § 470j (1994).

<sup>166</sup> 36 C.F.R. § 800.6(c)(2) (1997).

<sup>167</sup> Telephone interview with Susan Pierce, acting deputy State Historic Preservation Officer (Oct. 24, 1997).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*



National Register.<sup>173</sup> The advisory council has requested that some of the reports be forwarded to the keeper, even if the State Historic Preservation Office and the department of highways agree on a particular matter.<sup>174</sup>

The current focus for the advisory council, the State Historic Preservation Office, and the department of highways is identification of eligible properties affected by the proposed highway.<sup>175</sup> Two civil war battlefields have been implicated in this process. One of them is at Old Fields, north of Moorefield.<sup>176</sup> The other is located at Corrick's Ford, near Parsons.<sup>177</sup> Those sites provide two examples of areas which had to be forwarded to the keeper.<sup>178</sup> Even though the SHPO did not consider the Old Fields battlesite to be eligible, the keeper did; in this circumstance, the boundaries of the battlesite required that the department of highways shift the road.<sup>179</sup> When the advisory council looked at Corrick's Ford, it determined the eligible area to be larger than the SHPO had following its identification process.<sup>180</sup> Section 106 review concerning Corridor H has proven to be a time-consuming procedure, not only because of disputes over eligibility, but also each particular historic boundary.<sup>181</sup>

If the Department of Highways wants to build a section of the proposed highway, then adjacent sections must be approved as well before construction can begin.<sup>182</sup> For example, if the Department of Highways intends to begin construction on section four, then sections three, four and five must be approved. On its face, this procedure appears to take care of potential problems by ensuring that sections of the highway will not be built without a connecting piece. However, one does not have to look very deep to discover potential problems with this system. Sections

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

not immediately adjacent to the proposed construction site do not have to be approved before construction can begin.<sup>183</sup> This fact could lead to potential problems in mitigation. A keeper will recommend altering the structure of the road only where it is “prudent” and “feasible.”<sup>184</sup> For example, if sections of the highway eventually lead up to an important historic site from both directions, it is not very likely that moving the road will be found “prudent” or “feasible” after millions and millions of dollars have been spent in construction costs. In order to circumvent potential difficulties with preservationists, the department of highways could build first where there are no historic sites implicated, and then later claim that it is not “prudent” or “feasible” to waste millions of dollars not to connect the sections together. Building section four of the road takes into account historic properties in sections three and five, but does not take into consideration sections two or six. As more sections of Corridor H are built, it will become more difficult to protect valuable historic properties, despite the fact that a federal agency is involved in the project.

C. *The National Register of Historic Places*

The National Historic Preservation Act of 1966<sup>185</sup> created the National Register of Historic Places.<sup>186</sup> The National Park Service through the Department of the Interior manages the National Register.<sup>187</sup> The register is designed as a planning tool to help identify important “cultural resources” that should be protected from “destruction or impairment.”<sup>188</sup> However, properties on the National Register are not automatically protected from alteration or destruction. While a listing on the register affords some degree of protection, that protection is both tenuous in nature and limited in scope: a listing on the register will not necessarily prevent a private property owner from altering or destroying her property. However, owners who have properties listed in the National Register can receive federal and state tax incentives and grants for restoring and rehabilitating their

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183 *Id.*

184 *Id.*

185 16 U.S.C. § 470 (1994).

186 16 U.S.C. § 470a (1994).

187 *Id.*

188 36 C.F.R. § 60.2 (1997).

properties.<sup>189</sup>

The National Historic Preservation Act obligates the Secretary of the Interior to “expand and maintain” a register of nationally significant properties.<sup>190</sup> The NHPA authorizes two separate lists: the National Register of Historic Places and the National Register of Historic Landmarks.<sup>191</sup> While the former is comprised of nationally significant cultural resources, the latter has a higher threshold test.<sup>192</sup> In order to be placed on the National Register of Historic Landmarks, a property must be deemed to have outstanding national significance.<sup>193</sup> National landmarks found in West Virginia include the Wheeling Suspension Bridge, the Alexander Wade House in Morgantown (also known as the Waitman T. Willey House), and the Grave Creek Mound in Moundsville.<sup>194</sup> When preservationists discuss “The Register,” however, they are usually talking about the National Register of Historic Places, because of the vast number of properties affected by comparison. This survey focuses on the National Register of Historic Places. Five types of properties may be listed on the register: “districts, sites, buildings, structures, and objects.”<sup>195</sup>

1. Property Types Listed on the National Register of Historic Places
  - a. Districts

A district is a “geographically definable area.”<sup>196</sup> It must possess a “significant concentration, linkage or continuity of sites, buildings, structures or objects united by past events, or aesthetically by planning or physical

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<sup>189</sup> 36 C.F.R. § 60.2(b), (c) (1997).

<sup>190</sup> 36 C.F.R. § 60.1(a) (1997).

<sup>191</sup> 16 U.S.C. § 470a(a)(1)(A), (B) (1994).

<sup>192</sup> *Id.*

<sup>193</sup> 16 U.S.C. § 470a(a)(1)(B) (1994).

<sup>194</sup> PRESERVATION ALLIANCE OF WEST VIRGINIA, INC., PRESERVATION SOURCEBOOK: A GUIDE TO WEST VIRGINIA HISTORIC PRESERVATION 16-17 (1983).

<sup>195</sup> 36 C.F.R. § 60.4 (1997).

<sup>196</sup> 36 C.F.R. § 60.3(d) (1997).

development.”<sup>197</sup> A district can be divided geographically, as long as it is united by a common association or history.<sup>198</sup> The Georgetown Historical District in Washington, District of Columbia is an example of an historically significant district.

b. Sites

A site is defined under the act as “the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains a historical or archaeological value regardless of the value of any existing structures.”<sup>199</sup> For example, the location of the Battle of Blair Mountain in southern West Virginia exemplifies a site. Prickett’s Fort, north of Fairmont, would be another.

c. Buildings

A building can include “a house, barn, church, hotel, or other similar structure.”<sup>200</sup> Groupings can also be considered buildings within the boundaries of the act; a courthouse and jail, or a house and garage could qualify as a building.<sup>201</sup>

d. Structures

A structure is usually a large engineering project.<sup>202</sup> It is defined as a work comprised of “interdependent and interrelated parts in a definite pattern of organization.”<sup>203</sup>

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197 *Id.*

198 *Id.*

199 36 C.F.R. § 60.3(l) (1997).

200 36 C.F.R. § 60.3(a) (1997).

201 *Id.*

202 36 C.F.R. § 60.3(p) (1997).

203 *Id.*

e. Objects

Finally, the definition of an object is broad in scope. An object can be of "functional, aesthetic, cultural, historical, or scientific value."<sup>204</sup> It can be movable, but is usually associated with a particular setting.<sup>205</sup>

2. Criteria for Eligibility

The Secretary of the Interior developed certain criteria for eligibility to the register.<sup>206</sup> These criteria identify the range of resources and kinds of significance that will qualify properties for a listing. Properties that satisfy the criteria for eligibility, whether officially listed or not, trigger the Section 106 review process.<sup>207</sup> A property need only satisfy one of the criteria to become eligible for listing to the register. However, several general considerations, called the "criteria considerations," limit the eligibility of specific properties.<sup>208</sup>

There are four main criteria for eligibility. First, a property may be registered if it is "associated with events that have made a significant contribution to the broad patterns of our history."<sup>209</sup> Basically, this means that a property is eligible if it is associated with a particular event, or series of events, significant in our history. The particular event can be significant at the national, state, or local level. For example, the founding of a community, a pattern of agricultural land use, or a specific battlesite would each satisfy this criteria. The second criteria is association with the life of a person significant in our history.<sup>210</sup> That person may be important at the national, state, or local level. The Waitman T. Willey house, or the Mother Jones house, in West Virginia would be eligible under this criteria.

The third possible criteria for admission to the National Register contains four subparts, all dealing with the art or architecture of a given property, whether

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<sup>204</sup> 36 C.F.R. § 60.3(j) (1997).

<sup>205</sup> *Id.*

<sup>206</sup> 36 C.F.R. § 60.4 (1997).

<sup>207</sup> 16 U.S.C. § 470f (1994).

<sup>208</sup> 36 C.F.R. § 60.4 (1997).

<sup>209</sup> 36 C.F.R. § 60.4(I)(a) (1997).

<sup>210</sup> 36 C.F.R. § 60.4(I)(b) (1997).

it is a site, structure or building.<sup>211</sup> First, a property may be eligible if it embodies “the distinctive characteristics of a type, period, or method of construction.”<sup>212</sup> A building would be eligible, for example, if it was designed in a particular architectural style typical of a specific period in history. The second subpart provides for work done by masters.<sup>213</sup> The West Virginia state capitol qualifies under this particular criterion because of its design.<sup>214</sup> If a property is designed or built by a master, whether the master is an engineer, landscape architect, architect or builder, the property is eligible for a listing.<sup>215</sup> It is not necessary that the master be famous, or even well-known among those in the profession. It may not even be necessary that the master be known by name.

Sometimes the work of an individual can be recognized for their contribution to the architecture of a region or by examining structures of a particular period. The third subpart declares eligible any property that “possess[es] high artistic values.”<sup>216</sup> For example, a mural, fine woodwork, and prehistoric rock painting would all potentially qualify under this category. The final subpart to the third category of eligibility states that a property may be listed if it “represent[s] a significant and distinguishable entity whose components may lack individual distinction.”<sup>217</sup> This subpart is intended for use with districts. A group of buildings or an area of a city may be eligible collectively, even though its individual parts would not meet the criteria for a listing.<sup>218</sup> A set of company houses from an old coal town, or a set of buildings along a riverfront area, may be an example of a district that would meet this criteria.

The final criteria usually applies to archeological sites and districts.<sup>219</sup> This criteria permits properties to be registered if the properties have provided, or may

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<sup>211</sup> 36 C.F.R. § 60.4(I)(c) (1997).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Rasmussen, *supra* note 1.

<sup>215</sup> *Id.*

<sup>216</sup> 36 C.F.R. § 60.4(I)(c) (1997).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> 36 C.F.R. § 60.4(I)(d) (1997).

likely yield important information concerning history or prehistory.<sup>220</sup> Important information is anything that can contribute to a particularly significant research question about the past, or if it is likely to be of use in answering such questions in the future. In West Virginia, there are several locations on the National Register which are eligible under this criterion. A site in Saint Albans is one of them.<sup>221</sup> It is the most deeply stratified site in the United States, with deposits that extend to fifteen feet deep.<sup>222</sup> These deposits date to approximately 11,000 B.C.<sup>223</sup> Another historical archeological site in West Virginia is the Grave Creek Mound site, which contains the largest Adena mound in the United States.<sup>224</sup> Because of its historic significance, this site is on both the National Register of Historic Places and the National Register of Historic Landmarks. The Buffalo site in Putnam County, a late prehistoric village containing artifacts that date back to the 1600s, is another listing under this criteria.<sup>225</sup>

### 3. Criteria Considerations: Limitations on Eligibility

As previously noted, some general considerations limit a property's eligibility. Called the "Criteria Considerations," they are partial exceptions to the four National Register Criteria.<sup>226</sup> There are seven such limitations on eligibility.<sup>227</sup> First, a religious property is not eligible unless its primary significance is architectural or artistic in nature, or if it is of particular historical importance.<sup>228</sup> A church whose primary significance is attributed to religious ceremonies, for example, would not qualify for a listing. The second consideration focuses on

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<sup>220</sup> *Id.*

<sup>221</sup> Telephone interview with Pat Trader, Senior Archeologist, State Historic Preservation Office (Nov. 10, 1997).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> 36 C.F.R. § 60.4(II) (1997).

<sup>227</sup> *Id.*

<sup>228</sup> 36 C.F.R. § 60.4(II)(a) (1997).

properties that have been moved from their original location.<sup>229</sup> A property is not eligible if it has been removed from its original location, unless it is significant in a way disassociated from its location.<sup>230</sup> However, properties are still eligible if their significance is primarily derived from its architectural value, or if the property is the most important surviving structure associated with an historical figure or event.<sup>231</sup>

The criteria considerations place constraints on birthplaces and graves, as well.<sup>232</sup> Those types of properties are generally not eligible unless the individual is of outstanding importance, and there is no other appropriate site or building directly associated with his or her life.<sup>233</sup> In addition, there are restrictions placed on the eligibility of cemeteries.<sup>234</sup> A cemetery is not eligible for the National Register unless it derives its primary significance “from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events.”<sup>235</sup> This consideration excludes many cemeteries from eligibility; however, many cemeteries are listed on the National Register, usually either because they contain the remains of many historic figures or because of their age.

In addition, reconstructed buildings are not eligible for a listing, except under special circumstances.<sup>236</sup> The criteria generally exclude these types of buildings because of their lack of authenticity. However, a reconstructed building may still be listed if it satisfies three criteria: (1) the reconstruction is historically accurate; (2) the building is “presented in a dignified manner as part of a restoration master plan;” and (3) no other, original building or structure survives that has the same association.<sup>237</sup> Reconstructed buildings may be eligible if they are the only

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<sup>229</sup> 36 C.F.R. § 60.4(II)(b) (1997).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> 36 C.F.R. § 60.4(II)(c) (1997).

<sup>233</sup> *Id.*

<sup>234</sup> 36 C.F.R. § 60.4(II)(d) (1997).

<sup>235</sup> *Id.*

<sup>236</sup> 36 C.F.R. § 60.4(II)(e) (1997).

<sup>237</sup> *Id.*



properties representing a particular event, person, period, or type of construction.<sup>238</sup> Furthermore, a property whose value is primarily commemorative cannot be registered unless it has its own historical significance. This significance can be a result of its “design, age, tradition, or symbolic value.”<sup>239</sup>

The final criteria consideration places a time requirement on property eligible for a listing on the National Register. Unless a property is of exceptional importance, it must be older than fifty years to be considered eligible.<sup>240</sup> Properties associated with World War II, for example, only recently could be considered for admission to the register. Although properties that have achieved significance in space exploration are not yet fifty years old, they may be eligible for the Register due to the exceptional importance of the events with which they are associated.

Finally, in addition to both meeting one or more of the criteria and to satisfying the general considerations, a property must have “integrity of location, design, setting, materials, workmanship, feeling and association.”<sup>241</sup> If a property has been altered or compromised to the point at which its historical integrity is affected, it may not be eligible for the register. In order to determine a property’s integrity, it must be measured against the particular criterion it satisfies. For each criterion, some aspects of integrity will prove more important than others. If a property is eligible because it represents the work of a master, for example, integrity of workmanship will be important in deciding its eligibility. Integrity of location, on the other hand, may not be important at all.

#### D. *The West Virginia Division of Culture and History*

The West Virginia Division of Culture and History is the state’s governing body for historic preservation.<sup>242</sup> The commissioner of the division serves as the state historic preservation officer (SHPO).<sup>243</sup> Within the division, two bodies treat preservation issues: the Historic Preservation Section (HPS) and the Citizens’

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> 36 C.F.R. § 60.4(II)(g) (1997).

<sup>241</sup> 36 C.F.R. § 60.4 (1997).

<sup>242</sup> W. VA. CODE § 29-1-1 (Supp. 1997).

<sup>243</sup> W. VA. CODE § 29-1-2 (1992).

Commission on Archives and History.<sup>244</sup>

The Archives and History Commission carries out the provisions of the National Historic Preservation Act of 1966 and serves as the "state review board" under the act.<sup>245</sup> The Governor appoints thirteen members to the commission. These citizen volunteers represent a variety of interests within the historic preservation field.<sup>246</sup> The membership includes the following: "[a] historian, [an] architectural historian, [an] historical architect, [an] archaeologist specializing in historic and prehistoric archeology, [an] archivist, librarian and museum specialist."<sup>247</sup> The director of the state Geological and Economic Survey, the president of the West Virginia Preservation Alliance, Inc., and the SHPO serve as *ex officio* non-voting members of the commission.<sup>248</sup>

The Archives and History Commission primarily has advisory and supervisory powers over the historic preservation section of the Division of Culture and History. It oversees the archives and history section, the museums section, and the historic preservation section; thus, its involvement with historic preservation is somewhat limited. The commission advises the commissioner and the HPS concerning the accomplishment of preservation objectives and encouraging and promoting such objectives.<sup>249</sup> The commission also oversees the operation of the Historic Preservation Section in several ways, including the following: the approval and distribution of federal and state grant money; the administration of federal funds; and the approval of rules and regulations concerning its policies and functions.<sup>250</sup> Furthermore, the Archives and History Commission must review and approve nominations to the National Register of Historic Places.<sup>251</sup>

While the Commission has general supervisory powers, it is the SHPO in conjunction with the HPS who administer the historic preservation program in West

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<sup>244</sup> W. VA. CODE § 29-1-1 (Supp. 1997).

<sup>245</sup> W. VA. CODE § 29-1-5 (Supp. 1997).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> W. VA. CODE § 29-1-5(a), (d) (Supp. 1997).

<sup>250</sup> W. VA. CODE § 29-1-5(b), (c), (e) (Supp. 1997).

<sup>251</sup> W. VA. CODE § 29-1-5(g) (Supp. 1997).

Virginia.<sup>252</sup> The commission serves as an advisory committee to the SHPO.<sup>253</sup> The National Historic Preservation Act establishes the responsibilities of the State Historic Preservation Office, which is a branch of the National Park Service.<sup>254</sup> This office carries out the practical administration of historic preservation in West Virginia. Administrative duties include the following: overseeing comprehensive statewide planning; conducting statewide surveys to identify historic properties; administering federal grant programs; assisting local governments in planning and development, as well as actual preservation projects; disseminating information to the public; and participating in the Section 106 review process.<sup>255</sup> In West Virginia, the SHPO performs Section 106 regulatory and compliance work, survey work, and determines eligibility to the National Register.<sup>256</sup>

In West Virginia, the office is not a full-time position; the Commissioner of Culture and History also serves as the SHPO. The SHPO runs the HPS within the Division of Culture and History.<sup>257</sup> The HPS's responsibilities are broad-based and extensive: "to locate, survey, investigate, register, identify, preserve, protect, restore, and recommend" historically significant properties.<sup>258</sup> The HPS, with the SHPO at the helm, is the organization that carries out the practical aspects of the National Historic Preservation Act of 1966.<sup>259</sup> Under the West Virginia Code, the HPS also "develop[s] and maintain[s] a West Virginia State Register of Historic Places for use as a planning tool for state and local government[s]."<sup>260</sup> However, the HPS uses the National Register in lieu of having a separate state listing.<sup>261</sup>

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<sup>252</sup> Pierce, *supra* note 167; Interview with Billy Joe Peyton, Associate Director, Institute for the History of Technology and Industrial Archaeology (Aug. 12, 1997).

<sup>253</sup> Pierce, *supra* note 167.

<sup>254</sup> 16 U.S.C. § 470a(b)(1) (1994).

<sup>255</sup> Peyton, *supra* note 252; Pierce, *supra* note 167.

<sup>256</sup> Pierce, *supra* note 167.

<sup>257</sup> W. VA. CODE § 29-1-8 (1992).

<sup>258</sup> W. VA. CODE § 29-1-8 (1992).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Pierce, *supra* note 167.

### E. *Historic Landmarks Commissions*

If the SHPO and the HPS administer the historic preservation program in West Virginia, landmarks commissions are the vehicle by which policy may be carried out.<sup>262</sup> Historic landmarks commissions are either set up by a municipal or county commission and are the primary mechanism for local preservation activity.<sup>263</sup> A city or county government may endow its landmarks commission with as much or as little power as it desires.<sup>264</sup> In communities with strong landmarks commissions, there is a stronger historic preservation force.

Landmarks commissions can protect privately owned, historically significant properties from alteration and destruction.<sup>265</sup> Under the West Virginia Code, landmarks commissions may survey and identify historic properties; prepare a local register of such properties; establish standards of care for local historic landmarks; acquire, administer, lease or sell historic landmarks; promote preservation legislation; and administer funds.<sup>266</sup> Landmarks commissions can maintain a local register, and set up regulations to review locally designated districts; through a public hearing process, the commission can prevent demolition or alteration of an historically significant structure.<sup>267</sup> Landmarks commissions in Jefferson County and Berkeley County, for example, have their own local registers of historic places. In order for a landmarks commission to have design review power, the city or county must assign it. Landmarks commissions in Lewisburg, Martinsburg, and the east end of Charleston all have some design review power.<sup>268</sup> The commission in Wheeling technically has design review; however, the city does not have a district established to enforce the review powers.<sup>269</sup>

Technically, no limits exist on what types of design review the commission

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<sup>262</sup> Peyton, *supra* note 252.

<sup>263</sup> W. VA. CODE § 8-26A-4 (1998).

<sup>264</sup> W. VA. CODE § 8-26A-5 (1998).

<sup>265</sup> Pierce, *supra* note 167.

<sup>266</sup> W. VA. CODE § 8-26A-5(a)-(k) (1998).

<sup>267</sup> *Id.*; Pierce, *supra* note 167.

<sup>268</sup> Pierce, *supra* note 167.

<sup>269</sup> *Id.*

can enact.<sup>270</sup> However, a landmarks commission's power is limited only to that which it is allotted by the city. When the commission in Lewisburg attempted to regulate a soda machine outside a gas station, for example, the city objected.<sup>271</sup> The benefit of having a local organization in control of historic preservation is that local people are often better able to judge what is culturally significant to the community. As historical significance depends on cultural significance, cultural significance depends upon the culture within which it operates. Recognizing the importance of local preservation programs, the SHPO lends financial and technical support to local landmarks commissions.<sup>272</sup> Under the Certified Local Government Program, the SHPO sets aside grant money to give to local governments to facilitate the development of local preservation programs, including the following: survey work, design guidelines, National Register nominations, and preservation education.<sup>273</sup>

*F. The National Main Street Program*

Within the National Trust for Historic Preservation is housed the national Main Street program.<sup>274</sup> The Main Street program is comprised of over 700 municipal divisions in downtowns across the country.<sup>275</sup> This non-profit organization contributes to historic preservation by dedicating itself to the continued economic and aesthetic revitalization of downtown areas.<sup>276</sup> The National Main Street program grew out of a concern that "towns and cities were destroying their heritage by tearing down sound historic buildings and replacing them with parking lots in an effort to compete with malls and shopping centers."<sup>277</sup> Seventeen cities

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> MAIN STREET MORGANTOWN, DESIGN GUIDELINES FOR PUBLIC PROJECTS i (1990) (on file with author) [hereinafter DESIGN GUIDELINES].

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> MAIN STREET MORGANTOWN, THE FOUR POINT APPROACH (on file with author)[hereinafter FOUR POINT APPROACH].

and towns in West Virginia are associated with the Main Street program.<sup>278</sup> Among them are Charleston, Morgantown, Fairmont, New Martinsville, Beckley, and Wheeling.<sup>279</sup> Local organizations are funded by membership dues from contributing businesses, grants, and public sector funding from both the city and the county.<sup>280</sup> The state lends technical assistance and support.<sup>281</sup>

Main Street programs continue to have greater influence in the area of historic preservation. Because the individual programs have a broad-based foundation of support, and yet are non-governmental in nature, they are often very influential in municipal projects and city planning efforts. For example, Main Street Morgantown has not only sponsored a multitude of independent projects, but the organization has also influenced municipal zoning and planning regulations.<sup>282</sup> The first time it assisted in zoning regulation was in 1993 with a regulation that called for a review of all signage over twelve feet in surface area.<sup>283</sup> Main Street Morgantown is also in charge of implementing the city's downtown revitalization plan developed in 1994.<sup>284</sup> Because an organization like Main Street has a strong support network and specialization in many areas of downtown revitalization, the organization's services can be utilized freely by the city as "downtown expertise" without a personal interest at stake.

Main Street organizations offer a variety of programs to improve downtown areas. Some of these programs aim at improving the general economic and aesthetic health of the downtown. Others focus on specific businesses interested in improvement. Because downtown areas usually have the primary concentration of historic buildings in a given area, Main Street has the potential to dramatically affect the preservation, renovation and restoration of a town's aesthetic history. Main Street may affect the aesthetic landscape of downtowns because of its non-governmental nature, its volunteer support, and its strong nationwide support

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<sup>278</sup> Interview with Terri Cutright, Executive Director of Main Street Morgantown (Aug. 5, 1997).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

network through the National Trust.<sup>285</sup> Governed by a board of directors and staffed by an executive director, four committees of volunteers comprise the bulk of the organization.<sup>286</sup> The four committees focus on four primary areas: promotion, design, organization, and economic restructuring.<sup>287</sup> Although each committee is part of the historic preservation fabric, the design committee generally deals with preservation issues.<sup>288</sup> This committee assists in restoring buildings and improving facades and signage through several grant programs made available to contributing downtown businesses.<sup>289</sup>

While Main Street organizations do not promulgate legislation, they are able to submit regulations and guidelines to city councils for approval.<sup>290</sup> An Urban Design Guideline Subcommittee is part of the Main Street Morgantown organization.<sup>291</sup> This subcommittee is in the process of developing urban design guidelines for downtown Morgantown.<sup>292</sup> Modeled after urban renewal design guidelines passed in Charleston, these guidelines provide a comprehensive plan for the design of the downtown historic district.<sup>293</sup> After approval by the subcommittee, the guidelines will go to the municipal planning commission, which oversees the general planning and zoning of the city.<sup>294</sup> Preservation issues influenced the development of these regulations, both in Charleston and in Morgantown.<sup>295</sup> The Charleston guidelines contained a provision, for example, which states that the facade of each building must be completely restored before the owner can do any

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285 *Id.*

286 *Id.*

287 DESIGN GUIDELINES, *supra* note 274, at i.

288 Cutright, *supra* note 278.

289 *Id.*

290 *Id.*

291 *Id.*

292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.*

type of improvement or remodeling.<sup>296</sup> For example, if an owner were to rent out her building to telemarketers for a temporary survey, the building facade would have to be completely restored before she could redo the space to accommodate them. The urban design guidelines for Morgantown are not nearly as stringent. However, historic elements of the downtown landscape, such as sidewalk paving materials, are preserved in specific provisions.<sup>297</sup>

Main Street programs can have as broad or as narrow a focus as participation demands. In many cities, Main Street programs have substantially affected the downtown landscape, by financially and technically supporting historic preservation and restoration. By supporting these efforts, Main Street has increased property values, invested millions of dollars in the business communities, assisted in both the design and financing of historic renovation and restoration, and increased community awareness of historic buildings.<sup>298</sup> Main Street also sponsors programs such as downtown revitalization plans, business recruitment, and historic walking tours.<sup>299</sup>

G. *Preservation Alliance of West Virginia, Inc.*

Private, volunteer citizens' groups are an important contributor to the development of historic preservation law. These organizations are largely responsible for the increase in attention given to preservation issues nationwide. They have not only garnered media attention and contributed their efforts to specific preservation projects, but they have also gained public support by disseminating information and assisting community-based projects by providing guidance in community organization, architectural design, and public awareness. Preservation Alliance of West Virginia, Inc. (Preservation Alliance) is the largest such group in West Virginia.<sup>300</sup> It is a statewide grassroots organization that advocates for historical cultural resources.<sup>301</sup> Supported by grant money, membership dues, and volunteer efforts, Preservation Alliance attempts to serve as a communication and

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<sup>296</sup> *Id.*

<sup>297</sup> See Main Street Morgantown Urban Design Guideline Subcommittee, Draft: Urban Design Guidelines, B-4 District, Morgantown West Virginia (March 10, 1997) (on file with author).

<sup>298</sup> FOUR POINT APPROACH, *supra* note 277.

<sup>299</sup> Cutright, *supra* note 278.

<sup>300</sup> Peyton, *supra* note 252.

<sup>301</sup> *Id.*



coordination network dedicated to education and advocacy.<sup>302</sup> The organization also provides technical support and offers statewide conferences and workshops.

Preservation Alliance is beginning two major initiatives to help historic preservation efforts around the state.<sup>303</sup> First, the organization is working on a program through which property owners can donate exteriors and facades of historic buildings to Preservation Alliance.<sup>304</sup> This program will help create protective covenants on historic properties.<sup>305</sup> Preservation Alliance is also attempting to launch a statewide heritage tourism program.<sup>306</sup> Through this program, Preservation Alliance will lend technical assistance in program development to communities in West Virginia.<sup>307</sup>

### III. INCENTIVES FOR PRESERVATION

From 1978 to 1987, nearly twelve billion dollars was spent on rehabilitating historic buildings in the United States.<sup>308</sup> From 1981 to 1986 alone, property owners invested more private money in rehabilitating historic buildings than they had in the rest of American history combined.<sup>309</sup> Much of the investment in historic preservation was due to tax incentives adopted in 1976 and expanded in 1978 and 1981.<sup>310</sup> In 1986, Congress eliminated most of these tax incentives.<sup>311</sup> Congress reduced the amount of income tax credit and limited the amount available to an

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<sup>302</sup> *Id.*

<sup>303</sup> Telephone Interview with Terrell Ellis, Executive Director, Preservation Alliance, Inc. (Dec. 7, 1997).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> Harry K. Schwartz, *A Federal Historic Rehabilitation Tax Credit for Home Ownership*, HISTORIC PRESERVATION NEWS REPRINT, Oct./Nov. 1994, at 14.

<sup>309</sup> Jayne F. Boyle et al., *A Guide to Tax-Advantaged Rehabilitation*, PRESERVATION INFORMATION, THE NATIONAL TRUST FOR HISTORIC PRESERVATION, vol. 1 at 1 (1994).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

individual in any given year.<sup>312</sup> Congress also precluded high-income taxpayers from utilizing the credit.<sup>313</sup> In the eight years following the tax reform legislation, the number of certified rehabilitation projects fell by eighty-two percent.<sup>314</sup> Investment in those projects fell by eighty percent.<sup>315</sup>

Federal tax incentives for the rehabilitation of historic buildings still exist, however. While the incentives are not as extensive as in years past, the federal tax credit program can be an important historic preservation tool. Federal income tax credits are designed to encourage the rehabilitation and reuse of certified historic structures and old, non-historic structures.<sup>316</sup> A certified historic structure is one that is individually listed on the National Register; a contributing building in an historic district on the National Register; or a contributing building in a designated local historic district eligible for a listing on the National Register.<sup>317</sup> Certified historic structures qualify for a credit of twenty percent of the qualified rehabilitation expenditures.<sup>318</sup> In order to qualify for the credit, the Department of the Interior must certify that the rehabilitation is consistent with the historic character of the building, and where applicable, with the historic district within which it is located.<sup>319</sup> The interior and exterior rehabilitation must be done in accordance with the Secretary of the Interior's standards for rehabilitation for historic preservation projects.<sup>320</sup>

Federal tax incentives are also available for the rehabilitation of old, non-historic structures.<sup>321</sup> A property falls into this category if it is a non-residential,

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<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> Boyle, *supra* note 310, at 2.

<sup>315</sup> *Id.*

<sup>316</sup> *Side by Side Comparison of the Current Rehabilitation Tax Credit with the Historic Homeownership Tax Credit* (The National Trust for Historic Preservation), Jan. 1997, at 1 [hereinafter *Side by Side Comparison*].

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Side by Side Comparison, supra* note 316.

non-historic building built before 1936.<sup>322</sup> Property owners of these buildings can qualify for a ten percent rehabilitation credit if the rehabilitation comports with regulations established by the Department of the Interior.<sup>323</sup>

West Virginia has a tax credit program established as a counterpart to the federal program designed as an incentive for preservation investment.<sup>324</sup> For properties which meet the National Register criteria, property owners can claim an investment tax credit on their annual income tax for rehabilitating or restoring an historic property.<sup>325</sup> The rate of credit is ten percent on state income taxes.<sup>326</sup> Like the federal program, the state program requires that the rehabilitation or restoration meet the Secretary of the Interior's standards for rehabilitation.<sup>327</sup>

Representatives in the United States House and Senate have recently introduced legislation designed to increase the amount of tax credit available for any historic structure occupied as a principal residence.<sup>328</sup> Called the Historic Homeownership Assistance Act,<sup>329</sup> the bill would provide homeownership opportunities and stimulate investment in the rehabilitation of historic buildings by expanding the current federal tax credit to include buildings owned and occupied as a principal residence.<sup>330</sup> The historic homeownership tax credit would apply to all "certified historic structures" currently eligible for a credit, plus buildings individually listed on state or local registers that have been nationally certified.<sup>331</sup> To qualify for the credit, a property owner must occupy the building (or part of it) as a place of principal residence.<sup>332</sup> The rate of credit under this program would be

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<sup>322</sup> Boyle, *supra* note 309, at 4.

<sup>323</sup> *Id.*; 26 U.S.C. § 47(c)(1) (1994).

<sup>324</sup> W. VA. CODE § 11-21-8a-f (1995).

<sup>325</sup> *Id.*

<sup>326</sup> W. VA. CODE § 11-21-8a (1995).

<sup>327</sup> W. VA. CODE § 11-21-8d (1995).

<sup>328</sup> *See, e.g.*, H.R. 1134, 105th Cong. (1997).

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* § 24(a) (1997).

<sup>331</sup> *Id.* § 24(d)(3) (1997).

<sup>332</sup> *Id.* § 24(e)(1)(B) (1997).

twenty percent of qualified rehabilitation expenditures.<sup>333</sup> Like the current program, rehabilitation under the Historic Homeownership Act must follow the Secretary of the Interior's standards for rehabilitation.<sup>334</sup> However, unlike the current program, there is no income cap on use of the historic homeownership credit.<sup>335</sup>

#### IV. CONCLUSION

In this survey, I have outlined the major legislation affecting historic preservation. I have also identified non-legislative major players in the historic preservation arena, in order to put preservation issues in perspective.

One common problem that arises on all levels of historic preservation legislation is that of definition. The main reason property is protected under historic preservation law is that it has some cultural value worthy of protection. Inherent in preservation issues, therefore, is the notion of cultural significance. Cultural or historic significance, however, can certainly vary from culture to culture. What may be historically significant to one person may not be to another. On a broader scale, what may be historically significant in one culture may be commonplace in another. Legislative efforts on all levels have attempted to solve this problem by being specific in their definitions and regulations. In an attempt to be specific and precise, however, sometimes several distinct regulations overlap on different levels.

Historic preservation is a field that involves distinct interests on many different levels. Architects, historians, politicians, lawyers, real estate agents, engineers, city planners, and business people are only a few of the types of people involved in the development of historic preservation. The interdisciplinary nature of historic preservation makes it a field difficult to categorize or define. Just as the cast is large, the actors act on many stages. Legislation affecting historic preservation exists on virtually all levels, from Congressional mandates to administrative regulations to local landmarks commissions. Similar responsibilities are assigned at each level; the various regulations overlap and create a multiplicity of competencies.

Efforts to preserve the heritage of West Virginia are increasing as a whole. However, individual battles continue to be waged in communities everyday. Like

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<sup>333</sup> *Id.* § 24(a) (1997).

<sup>334</sup> *Id.* § 24(c), (d) (1997).

<sup>335</sup> *Side by Side Comparison*, *supra* note 316, at 2.

the former National Bank of West Virginia building in downtown Morgantown,<sup>336</sup> historic buildings continue to be lost needlessly.

Preservation Alliance releases a list each year of the eleven most endangered historic sites.<sup>337</sup> This year, the list includes both nationally and locally significant sites, including the Elkins Coal and Coke Company Historic District.<sup>338</sup> Built in Preston County in 1903, this location was the last place in the United States to produce coke using beehive ovens.<sup>339</sup> A National Historic Landmark, it is overgrown and the remaining structures are in a state of decay.<sup>340</sup> The Arthurdale Inn in Preston County is another nationally significant site that remains endangered.<sup>341</sup> It was built in 1938 under the guidance of Eleanor Roosevelt, and served as lodging for visitors to the Arthurdale New Deal Homestead.<sup>342</sup> Trace Fork Canyon in Kanawha County is on the list, also, endangered by a twenty-eight acre shopping mall.<sup>343</sup> The canyon contains Native American artifacts, an historic mill, and one of the few hot springs in Kanawha County.<sup>344</sup> Only through the efforts of private individuals and communities will historically significant sites like these be saved. Through active landmarks commissions and receptive local governments, West Virginia can preserve its heritage, as well as benefit its future.

*Megan M. Carpenter\**

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<sup>336</sup> See *supra* notes 7-20 and accompanying text.

<sup>337</sup> *1997 Endangered List Gains Statewide Attention*, NEWS & NOTES, (Preservation Alliance of West Virginia, Inc.), Fall 1997, at 1.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.* at 2.

<sup>344</sup> *Id.*

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